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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

RUDOLPH O. SCHNEIDER, JR. and STEVEN VITALE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

The petitioners Rudolph O. Schneider, Jr. and Steven Vitale respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 12, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals, Eighth Circuit entered on April 12, 1972 in causes numbered 71-1393 and 71-1572, styled **Rudolph O. Schneider, Jr. and Steven Vitale, Appellants v. United States of America, Appellee**, said causes having been consolidated on appeal, is unreported at this time and is reproduced in the Appendix to this petition. No opinion was rendered in the District Court because the case was tried to a jury.

JURISDICTION

The opinion of the Court of Appeals was entered on April 12, 1972. Petitioners' timely Motion for Rehearing was overruled on May 18, 1972. Within thirty (30) days thereof, Mr. Justice Douglas of this court granted petitioner Schneider an extension of the time for petitioning this court to issue its Writ of Certiorari to and including July 17, 1972. No such extension was requested by or granted to petitioner Vitale; however, because these cases were tried upon a single indictment and consolidated on appeal, and all remaining issues of law and fact are identical, petitioner Vitale prays to be allowed to join in this petition pursuant to Rule 23.5 of this court. The jurisdiction of this court is invoked under Title 28 U.S.C., s. 1254 (1).

QUESTION PRESENTED

Whether Congress in the exercise of its power under the Commerce Clause can proscribe and punish wholly intrastate activities in the absence of any allegation or proof in an individual case that such activity is involved in or affects interstate commerce in any way whatever.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Article 1, Section 8, Clause 3:

[The Congress shall have power] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Title 18 U.S.C. 1955 provides in pertinent part:

Prohibition of illegal gambling business.

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling

business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a state of political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $20,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

* * * * * * *

STATEMENT OF THE CASE

Appellants were charged in a two-count indictment returned in the Eastern District of Missouri with violating, with others,[1] over a period of time, sections 563.350 and 563.360 Rev. S. Mo. (1969), which prohibit certain forms of wagering and pool-selling, and thereby conducting an illegal gambling business in violation of 18 U.S.C. 1955 (Count II), and with conspiring together with the same others to violate said Statutes in violation of 18 U.S.C. 371 (Count I) (Tr. 304-309). Prior to trial both petitioners filed motions to dismiss the indictment on the ground that 18 U.S.C. 1955, the basis for their charge, was an unconstitutional overreaching of congressional power under the Commerce Clause of the United States Constitution. Following a jury trial (William H. Webster, District Judge, Presiding) appellants were found guilty on both counts (Tr. 346-347). Upon conviction petitioner Schneider was sentenced to a term of imprisonment of one year on each count (subject to the provisions of 18 U.S.C. 4208(a)(2)), the sentences to run concurrently (Tr. 349-350). Vitale was sentenced to a term of imprisonment of six months on each count (with the provision that the sentence could be served in a jail type institution), the sentences to run concurrently. In addition he was fined $1,000.00 on Count I (Tr. 352-353).

The sufficiency of the evidence to support petitioner's convictions under the indictment and the court's charge is not an issue on this appeal. The sole issue is the constitutionality of 18 U.S.C. s. 1955. The Government's evi-

[1] Casimir v. Snopek and Robert Kolasch were also named as defendants (Tr. 304, 309). Also named in both counts of the indictment, but not charged, were Alan Goewert, Ned Christopher Hughes, Jr., Michael Tracy Ratchford, and Robert Leroy Wetzel (Tr. 305, 309). All of these individuals testified for the government (Tr. 20, 37, 83, 138, 157, 172).

dence tended to show that between November 3, 1970 and December 8, 1970 appellants were involved in selling wagering pools on football games by means of sports parlay cards. These cards consisted of two parts. The upper portion contained a list of opposing football teams with a point spread on each game (Tr. 128-129); the bottom portion of the card, attached by perforation, was marked by the bettor to indicate the team selected and the amount of money wagered. It was then detached from the top portion and given to one of the sellers along with the amount of money bet (Tr. 24, 39).

Parlay cards were sold by Robert Wetzel, Ned Hughes, Michael Ratchford, Robert Kolasch, Casimer Snopek and Alan Goewert. These cards, usually contained in brown paper bags, were normally picked up by the sellers on Tuesdays and the "hit" slips, or the bottom portion of the cards, had to be turned in by noon on Saturdays (Tr. 24, 84-86, 141-142).

Wetzel, Hughes and Ratchford picked up the parlay cards from and returned the hit slips to appellant Vitale at Steve's Lounge (Tr. 20-21, 23-27, 38-41, 84-86). Wetzel sold the cards for three weeks (Tr. 20-21, 25-26), Hughes sold the cards for four or five weeks, usually being given 150 to 200 cards to sell and normally turning in $150.00 (Tr. 38-41). Ratchford's involvement began in early November, 1970 and continued for approximately five weeks during which time he was given 150 to 200 cards and normally took in about $150.00 a week (Tr. 84-86).

Kolasch, Snopek and Goewert dealt in a similar manner with the petitioner Schneider at the Glass Hat Tavern (Tr. 138-142, 157-160, 174-177). Kolasch sold the cards five to seven times beginning sometime after "either September or October" (Tr. 139-141). Snopek began selling the parlay cards around the 3rd of November, 1970 (Tr. 159) and sold them for about five weeks (Tr. 160). Goewert be-

came involved in late November or early October, 1970 and sold the cards for eight to ten weeks (Tr. 174-176, 178). The gross take on his sales averaged around $100.00 a week (Tr. 182).

On December 8, 1970 Kolasch's car was stopped and searched by FBI agents (Tr. 122-124, 142). Shortly prior to this Kolasch had been observed by FBI agents receiving a brown paper sack from Mrs. Schneider at the Glass Hat Tavern (Tr. 168). The agents at this time seized from Kolasch a brown paper bag containing three football hit slips, $105.00 and 95 basketball parlay cards (Tr. 124-126, 142, 146-147). On the same date Goewert's car was also stopped and searched by FBI agents, and a brown paper bag was seized from the trunk of his automobile, which contained a number of basketball cards, four football hit slips and $30.00 (Tr. 114-115, 118-121, 182). Snopek's car was similarly stopped and searched and agents seized a brown paper bag containing 140 football parlay cards, two hit slips and $14.00 (Tr. 152-156, 161-162).

Agents also searched petitioner Schneider's car and the Glass Hat Tavern on December 8, 1970, seizing football hit slips, money and football and basketball parlay cards (Tr. 48-54, 56-64, 110, 190-191). Two of the envelopes seized at this time had the initials "S. V." on them (Tr. 52-54, 57-58). Appellant Schneider moved unsuccessfully both before and during trial to suppress the material seized at this time. The legality of this search, however, is not an issue in this court.

Petitioner Schneider presented no evidence in his own defense at the trial of this case, raising only the general issue and the constitutionality of 18 U.S.C. 1955. Petitioner Vitale, represented at that stage by separate and independent counsel, took the stand in his own defense and denied any involvement in the selling of parlay cards (Tr. 234, 236-241). Petitioner Vitale also called several charac-

ter witnesses and, in addition, FBI agent John Dunay, who testified that Ned Hughes, a key witness for the government, has not mentioned Steven Vitale when he first spoke to FBI agents regarding this matter (Tr. 250-252).

All of the events regarding which there was testimony at the trial of this cause took place in the northern part of the City or County of St. Louis, Missouri. As far as it appears from the testimony at the trial all of the persons involved were residents of Missouri and all distribution and sale of parlay cards took place in the City and County of St. Louis, Missouri. The government presented no evidence of the origin of the parlay cards or the ultimate disposition of the money collected; therefore, it may be assumed that this also took place in the area of St. Louis, Missouri. At no point during the trial or in pretrial proceedings was there any evidence or indication of interstate activity, direct or indirect involvement in interstate commerce, or any effect thereon; nor was there any indication that any persons other than those heretofore mentioned may have been involved in this activity. It was the government's position throughout the case that no such interstate involvement or connection need be shown under 19 U.S.C. 1955 in order to invoke the criminal jurisdiction of the United States.

REASONS FOR GRANTING THE WRIT

The Issue Presented Involves an Important Question of Federal Law Which Has Not Been, and Should Be, Decided by This Court. 18 U.S.C. 1955 Is an Unprecedented Extension of Federal Power and Marks a Major Inroad Into a Domain Traditionally Left to the States.

Congress has with this act, 18 U.S.C. 1955, for the first time sought to proscribe and punish wholly intrastate activity, in violation of state law, solely in the exercise of its power under the Commerce Clause, U.S. Const., Art. 1, Sec. 8, Cl. 3, without requiring the government to prove any nexus whatever with interstate commerce. The issues posed by this case have been presented to this court in two recent cases, but neither is dispositive of the issue raised here. United States v. Bass, ... U.S. ..., 30 L.ed 2d 488, 92 S.Ct. ... (No. 70-71, 12/20/71), raised the issue of whether Congress could prohibit possession of firearms by a convicted felon without a showing that the possession was somehow associated with interstate commerce. In that case, as in this, the government relied upon general statements of Congressional concern in the floor debates and the introductory sections of the Statute to argue in the affirmative. Both the Second Circuit and this court decided the case on the threshold issue of statutory construction, holding that in the words of the statute Congress had actually required the proof of an interstate commerce connection in each case. The critical Constitutional issue posed in the instant case is thus left unresolved. Although this court disclaimed any inclination regarding the Constitutional validity of the government's position in Bass, 30 LEd at 497, the Second Circuit expressed serious doubt "whether the statute, if given the interpretation for which the government contends, could withstand constitutional scrutiny," 434 F. 2d 1296, 1299.

United States v. Perez, 402 U.S. 146, more nearly presented the issue involved here. This case involved the activity commonly known as "loan sharking", made criminal by the Consumer Credit Protection Act of 1969, Title II, C.C.P.A., 82 Stat. 159, 18 U.S.C. 891 et seq. Although primary reliance by Congress in enacting this law was on the commerce clause, there was no requirement of an interstate aspect in each individual case. This court, however, in upholding Perez's conviction, also relied strongly on Congressional power under the Bankruptcy Clause, U.S. Const., Art. I, Sec. 8, Cl. 4, noting that uniform application and intent of the laws for the relief of debtors would be frustrated if creditors could still attempt collection by extortionate means condemned in the Act. There was likewise a much fuller Congressional history and findings of fact than in the instant case, including a profound study of organized crime by 22 Congressmen in 1966-67, a report of a state investigation of organized crime in New York which involved extensive hearings, and the reports of recently concluded hearings by a Senate Committee, 402 U.S. at 155.

The Second Circuit's interpretation of the Statute in **Bass** also, as this court noted, comported with the approach to federal criminal jurisdiction found in many other statutes.[2]

The government also relied heavily in the court below on two civil rights cases, **Heart of Atlanta Motel, Inc. v. United States**, 379 U.S. 241, and **Katzenbach v. McClung**, 379 U.S. 294. Such reliance, however, is misplaced. In each instance, this court found extensive interstate

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[2] 434 F. 2d, at 1298. See, e.g. 18 U.S.C. § 2421 (prostitution); 18 U.S.C. § 1952 (Travel Act); 18 U.S.C. § 1951 (robbery and extortion); 18 U.S.C. § 1231 (strikebreaking); 18 U.S.C. § 1201 (kidnaping); 18 U.S.C. § 1084 (gambling); 18 U.S.C.A. § 842i (1971 Supp.) (explosives); 15 U.S.C. § 1 et seq. (antitrust); 15 U.S.C. § 77e (securities fraud).

commerce connections through catering to interstate travelers and purchase of food and other goods in interstate commerce, 379 U.S. at 247 and 379 U.S. at 298. Other cases relied upon by the government may be similarly distinguished.

A primary concern of this court in reviewing cases such as **Perez**, **Bass** and this case was stated well by Mr. Justice Jackson speaking for the court in **United States v. Denmark**, 346 U.S. 441, 449: "The predominant consideration is that we should be sure that Congress has intentionally put its power in issue by the legislation in question."

There can be no doubt that Congress intended to put its power in issue in 18 U.S.C. 1955. As the Eighth Circuit stated in its opinion below, "Convictions under s. 1955 do not require a showing in each individual case that the gambling activities of a particular defendant have affected commerce even though Congress relied on the Commerce Clause in enacting this legislation." No other interpretation of the statute is possible, and no other Congressional power under Art. I is even peripherally relied upon.

Section 1955 therefore presents the sort of clearly expressed Congressional intent to alter the established balance of the Federal System in a manner which invites, even compels, this Court to step in and determine the permissible limits of Federal jurisdiction. This is the express intent to make a major inroad into a domain traditionally left to the states, which the Court found lacking in the **Bass** case, supra, and in **Rewis v. United States**, 401 U.S. 808, 812. Petitioners suggest that this "tradition" is in fact a mandate of constitutional dimension. Under our Federal system only this court has the power and the duty to resolve the conflict presented by this case and to determine the proper balance of state and federal power.

CONCLUSION

For the foregoing reasons Petitioners pray this court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and to review their decision in this case.

Respectfully submitted

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United States Court of Appeals
for the Eighth Circuit

Nos. 71-1393, 71-1572

Rudolph O. Schneider, Jr. and Steven Vitale,
Appellants,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: March 14, 1972
Filed: April 12, 1972

Before Gibson, Heaney and Ross, Circuit Judges

Heaney, Circuit Judge

The defendants were convicted of operating an illegal gambling business in violation of 18 U.S.C. § 1955.[1] That

[1] Section 1955, 18 U.S.C., states in part:

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

"(b) As used in this section—

"(1) 'illegal gambling business' means a gambling business which—

"(i) is a violation of the law of a State or political subdivision in which it is conducted;

"(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

section was originally part of Title VIII of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, *et seq.* On appeal, the defendants challenge the constitutionality of the statute as applied to them.

Convictions under § 1955 do not require a showing in each individual case that the gambling activities of a particular defendant have affected commerce, even though Congress relied on the commerce clause in enacting the legislation. See, 15 U.S.C. § 1511, note. In this case, a showing has not been made. The defendants argue that in the absence of such a showing, a conviction under the statute cannot be constitutionally sustained. The Supreme Court, however, has rejected a similar contention in *Perez v. United States,* 402 U.S. 146 (1971). There, the Court upheld Congress's power to control local "loan sharking," indicating that where the defendant's activities are within a regulated class of activities and where that class of activities is within the reach of federal power under the commerce clause, there is no need to show, in each individual case, that the defendant's activities affected commerce. See, *United States v. Cerrito,* 413 F.2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970); *White v. United States,* 399 F.2d 813 (8th Cir. 1968).

Here, Congress has found that illegal gambling affects interstate commerce. Organized crime uses money obtained through illegal gambling to infiltrate legitimate businesses and labor unions, to harm investors and com-

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"(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

"(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy bolita or numbers games, or selling chances theerin.

"(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

The defendants were also convicted of conspiring to violate § 1955.

peting businesses, and to corrupt the democratic process. See, 18 U.S.C. § 1511, note; 18 U.S.C. § 1961, note. Gambling, then, like loan sharking, "* * * in its national setting is one way organized interstate crime * * * syphons funds from numerous localities to finance its national operations." *Perez v. United States, supra* at 157. There is a sufficient rational basis for this conclusion,[2] and the means chosen to control the evil are reasonable. See, *White v. United States, supra* at 824.

In this case, there is no dispute that the defendants' activities were within the class of activities controlled by § 1955. Thus, we think the statute represents a constitutional exercise of power under the commerce clause, and that it is constitutional as applied to these defendants.

An additional constitutional problem is suggested because § 1955 prohibits gambling businesses which are in violation of the law of the state or political subdivision in which they are conducted. As a result, the effect of the statute may not be uniform throughout the nation. Gambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense. Even within a state, some forms of gambling may be federal offenses while other forms of gambling may not be. In *United States v. Aquino,* 336 F.

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[2] See, the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society,* at 5, 34, 35, 188-191 (1937); Task Force on Assessment: The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report; Crime and Its Impact—An Assessment,* at 52, 53 (1967); Task Force on Organized Crime: The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967); 116 Cong. Rec. 590, 591 (1970) (remarks of Senator McClellan); 116 Cong. Rec. 601 (1970) (remarks of Senator Hruska); 116 Cong. Rec. 603-606 (1970) (remarks of Senator Allott). Several District Courts have upheld the constitutionality of 18 U.S.C. § 1955. *United States v. Aquino,* 336 F.Supp. 737 (E.D. Mich. 1972); *United States v. Politi,* 334 F.Supp. 1318, 1322 (S.D. N.Y. 1971); *United States v. Harris,* 332 F.Supp. 315 (W.D. Tex. 1971).

Supp. 737 (E.D. Mich. 1972), the District Court rejected the contention that § 1955's potential lack of uniform national effect deprived the defendants of the equal protection of the laws. We, too, find that the basic concepts of equal protection have not been violated by 18 U.S.C. § 1955. See generally, *United States v. Synnes*, 438 F.2d 764, 771 (8th Cir. 1971), *overruled in part, United States v. Bass*, 404 U.S. 336 (1971).

The Supreme Court has stated that there is no requirement of national uniformity when Congress exercises its power under the commerce clause. *Secretary of Agri. v. Cent. Riog Co.*, 338 U.S. 604, 616 (1950) (upholding the Sugar Act of 1948, 7 U.S.C. § 1100, *et seq.*, which, it was argued, imposed certain sugar quotas for offshore areas such as Puerto Rico but not for mainland refineries); *Currin v. Wallace*, 306 U.S. 1, 14 (1939) (upholding the Tobacco Inspection Act, 7 U.S.C. § 511, which provided that in case the Secretary of Agriculture was unable to inspect all market areas, he should inspect those areas where the greatest number of growers could be served, with the result that some markets would be free to operate without inspection while others, even within the same state, would have to be inspected); *Clark Distilling Co. v. West'n Md. Ry. Co.*, 242 U.S. 311, 327 (1917) (upholding the Webb-Kenyon Act, 27 U.S.C. § 122, which prohibited transportation of liquor from one state into another to be used in violation of the laws of that state).

The Supreme Court has also approved, in a variety of contexts, the incorporation of state laws into federal statutes. *Ky. Whip & Collar Co. v. I.C.R. Co.*, 299 U.S. 334 (1937) (upholding the Ashurst-Sumners Act, ch. 412, 49 Stat. 494, which prohibited the transportation of convict-made goods into any state where the goods are intended to be received, possessed, sold or used in violation of state law); *Clark Distilling Co. v. West'n Md. Ry. Co., supra.*

See also, *United States v. Sharpnack,* 355 U.S. 286 (1958) (upholding the Assimilative Crimes Act of 1948, 18 U.S.C. § 13, which made applicable to a federal enclave subsequently enacted criminal laws of the state in which the enclave is situated), and see the cases cited therein.

This Court has held constitutional statutes whose restrictions on gambling were dependent on state law. "* * * [T]he fact that a federal criminal statute is based in part upon conduct proscribed by state law does not violate due process simply because of variations in the law of the several states. * * *" *Spinelli* v. *United States,* 382 F.2d 871, 890 (8th Cir. 1967), *rev'd on other grounds,* 393 U.S. 410 (1969) (upholding 18 U.S.C. § 1952, which prohibits traveling in interstate commerce to promote certain illegal activity, including gambling, which is in violation of the laws of the state in which it occurs). See, *Nilva* v. *United States,* 212 F.2d 115 (8th Cir. 1954), *cert. denied,* 348 U.S. 825 (1954) (upholding 15 U.S.C. § 1171-77, which prohibits the transportation of gambling devices into any state, but provides that a state may exempt itself from the act); *Turf Center, Inc.* v. *United States,* 325 F.2d 793 (9th Cir. 1963) (upholding 18 U.S.C. § 1952).

We think that the principles applied to those cases are equally applicable to the present case.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.